IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

INCYTE CORPORATION,	)	C.A. No. N15C-09-055 MMJ CCLD
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
FLEXUS BIOSCIENCES, INC., TERRY ROSEN, and JUAN JAEN,	)	
	)	
Defendants.	)	

Submitted: April 9, 2019
Decided: May 7, 2019

Upon Defendants' Motion for Attorneys' Fees
DENIED.

OPINION

Stephen L. Ascher, Esq. (argued), Jeremy H. Ershow, Esq., Kara K. Trowell, Esq., Michael J. Wadden, Esq., Jenner & Block LLP; David A. Schlier, Esq., Michael P. Kelly, Esq., J. Wylie Donald, Esq., McCarter & English, LLP, *Attorneys for Plaintiff Incyte Corporation.*

Jonathan A. Patchen, Esq., Max B. Twine, Esq., Taylor & Patchen, LLP, *Attorneys for Defendants Terry Rosen and Juan Jaen*

James F. Hurst, Esq., Patricia A. Carson, Esq. (argued), Kirkland & Ellis LLP, *Attorneys for Defendant Flexus Biosciences,* Inc.

Gregory V. Varallo, Esq., C. Malcolm Cochran, IV, Esq., Travis S. Hunter, Esq., Katharine L. Mowery, Esq., Richards, Layton & Finger, P.A., *Attorneys for Defendants*.

JOHNSTON, J.

PROCEDURAL CONTEXT

This motion follows a trial in which allegations of misappropriation of trade secrets were made against Defendants. Plaintiff's Complaint was filed on September 4, 2015. The jury returned its verdict on November 7, 2018. During those three years, the case was extremely hard-fought. The Court issued a number of opinions on complex issues raised by both parties. Several motions to compel and other discovery issues were resolved with the assistance of a Special Master. The Court determined the scope of the case at several points during the litigation.

As in many cases, but especially in trade secret cases, the nature of Plaintiff's claims evolved during the discovery process. Although the Complaint alleged that over twenty trade secrets were misappropriated, only two were tried before the jury in a trial that lasted ten days. As early as October 19, 2016, there were issues regarding whether Plaintiff was entitled to discovery because Defendants believed Plaintiff's claims were baseless.[1] Whether or not Plaintiff had enough information to pursue this lawsuit was a highly-contested issue throughout the litigation.

[1] In a hearing on October 19, 2016, Defendants argued that Incyte was not entitled to discovery because the Trade Secret Statement did not "say specifically…what data in particular Dr. Fridman stole and gave to us." The Court responded, "Well, how in the world could they possibly know that?"

At the conclusion of trial, the jury was asked to determine: whether each of the two alleged secrets were, in fact, trade secrets; whether any of the Defendants misappropriated those trade secrets; whether any of those Defendants were unjustly enriched as a result of the misappropriation; and, if they were unjustly enriched, to what extent. The jury also was asked to determine, if they found that the trade secrets were misappropriated, whether Defendants misappropriated the trade secrets willfully and maliciously.

The jury deliberated for two days, returning its verdict on November 7, 2018. The jury found that one of the alleged secrets was a trade secret, and that all three Defendants misappropriated that particular trade secret. However, the jury found that none of the Defendants were unjustly enriched as a result of the misappropriation. No damages were awarded, and the question of whether or not the trade secrets were misappropriated willfully and maliciously was not reached by the jury.

Plaintiff contends that it was the prevailing party because Defendants were found to have misappropriated a trade secret. Defendants argue that they were the prevailing party because no damages were awarded.

Defendants also argue, as the basis for this motion, that Plaintiff continued to pursue alleged misappropriation for trade secrets deemed no longer part of the suit. Defendants contend that they were forced to defend these allegations even

after Plaintiff dropped the claims. Defendants are seeking attorneys' fees incurred as a result of defending allegations of misappropriation pertaining to two trade secrets other than the two that were presented to the jury.

STANDARD OF REVIEW

Under the Delaware Uniform Trade Secret Act (DUTSA), "[i]f a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party."[2]

The "bad faith" element of DUTSA requires "objective speciousness of the plaintiff's claim…and its subjective bad faith in bringing or maintaining the claim."[3] "Objective speciousness exists where the action superficially appears to have merit, but there is a complete lack of evidence to support the claim."[4] "Subjective bad faith may be inferred by evidence that [the plaintiff] intended to cause unnecessary delay, filed the action to harass…or harbored an improper motive….Similar inferences may be made where the plaintiff proceeds to trial after

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[2] 6 *Del. C.* § 2004; *see Professional Investigating & Consulting Agency, Inc. v. Hewlett-Packard Company*, 2015 WL 1417329, at *6 (Del. Super.).

[3] *Kim Laube & Company, Inc. v. Wahl Clipper* Corporation, 2014 WL 12461044, at *3 (D. Cal.)(citing *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1111 (9th Cir. 2007)(quoting *Gemini Aluminum Corp. v. California Custom Shapes, Inc.*, 95 Cal.App.4th 1249, 1261-62 (Cal. Ct. App. 2002))).

[4] *FLIR Systems, Inc. v. Parrish*, 174 Cal.App.4th 1270, 1276 (Cal. Ct. App. 2009).

the action's fatal shortcomings are revealed by opposing counsel."[5] "A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence."[6]

In considering motions for attorneys' fees, "bad faith is assessed on the basis of the facts presented in the case. The party seeking the attorney's fees bears the burden of producing clear evidence of bad faith conduct."[7]

"'Misappropriation of trade secrets may be proven by circumstantial evidence', and more often than not, 'plaintiffs must construct a web of perhaps ambiguous circumstantial evidence from which the trier of fact may draw inferences which convince him that it is more probable than not that what plaintiffs allege happened did in fact take place.'"[8]

The Delaware Supreme Court has held that "the award of judgment, which determines who is the prevailing party, is a purely legal question."[9] "Although the determination of a prevailing party when the jury award is zero dollars has not been directly addressed by [the Delaware Supreme Court], the Superior Court has

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[5] *Id.* at 1278.
[6] *Gemini*, 95 Cal.App.4th at 1263.
[7] *Professional Investigating & Consulting Agency, Inc. v. Hewlett-Packard Company*, 2015 WL 1417329, at *9 (Del. Super.)(citing *Beck v. Atlantic Coast PLC*, 868 A.2d 840, 851 (Del. Ch.)).
[8] *Merck & Co., Inc. v. SmithKline Beecham Pharmaceuticals Co.*, 1999 WL 669354, at *20 (Del. Ch.)(quoting *Miles Inc. v. Cookson America, Inc.*, 1994 WL 676761, at *13 (Del. Ch.); *Greenberg v. Croydon Plastics Co.*, 378 F.Supp. 806, 814 (E.D.Pa. 1974)).
[9] *Cooke v. Murphy*, 2014 WL 3764177, at *3 (Del.)(citing *Graham v. Keene Corp.*, 616 A.2d 827, 828 (Del. 1992)).

held that the '[d]efendant is the prevailing party' where a plaintiff is awarded zero dollars."[10]

ANALYSIS

Neither Plaintiff nor Defendants cited a case in which a court held that the prevailing party is someone against whom misappropriation was found. Here, all Defendants were found to have misappropriated a trade secret. Defendants were exonerated for the claims for which fees are being sought.

In *Cooke v. Murphy*,[11] the plaintiffs appealed denial of a Motion for New Trial and a partial grant of a Motion for Costs following a jury trial in the Superior Court.[12] The jury found in favor of appellants (plaintiffs below), but awarded zero dollars in damages against the defendant.[13] The appellants claimed that the trial court erred in awarding costs to the defendant because the defendant was not the prevailing party. The Supreme Court affirmed the Superior Court's holding, finding that "the jury's award of zero dollars in damages to Appellants means that [the defendant] was the prevailing party."[14] Defendants have proffered this case to

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[10] *Id.* (citing *Miller v. Williams*, 2012 WL 3573336, at *2 (Del. Super.)).
[11] 2014 WL 3764177 (Del.)
[12] *Id.* at *1.
[13] *Id.*
[14] *Id.* at *3.

argue that because Plaintiff was awarded zero dollars in damages, Defendants are the prevailing party and are entitled to attorneys' fees.

The Court finds *Cooke v. Murphy* distinguishable. This case is for trade secret misappropriation. *Cooke v. Murphy* involved a personal injury and negligence. By its nature, trade secret misappropriation involves knowledge that the misappropriation occurred.[15]

Additionally, even if this Court were to determine that Defendants were the prevailing party, the analysis does not end there. Defendants still have the burden of proving that Plaintiff brought its case in bad faith.

The Court notes that Defendants offered a power point presentation during oral argument. In an effort to persuade the Court that Defendants were the prevailing party, Defendants quoted what they presented as the Verdict Form: "If…your (sic) find that Incyte has not proven one or more of [the] elements, then your verdict must be for Defendants."[16] Next to this quote, there is a green checkmark underneath Flexus, indicating that Flexus was the prevailing party and to suggest that the "verdict [was] for Defendants."

The language cited by Defendants purporting to be a part of the Verdict Form is contained nowhere in the Verdict Form. Defendants have cited this

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[15] 6 *Del. C.* § 2001(2)(a).

[16] Defendants' Power Point p. 40. Defendants provided an updated power point fixing certain typos that were present in the first copy. This quote was not changed in the updated version.

language erroneously. This language is contained in the jury instructions. However, the jury did not decide who was the "prevailing party" as part of its deliberations as guided by the Verdict Form.

Defendants cite *Professional Investigating & Consulting Agency, Inc. v. Hewlett-Packard Company* ("*PICA*")[17] for the proposition that attorneys' fees may be awarded for separate claims contained within a lawsuit. In *PICA*, the Court awarded attorneys' fees to the plaintiff after the jury determined that the defendants misappropriated certain trade secrets willfully and maliciously.[18] The jury awarded $1 million in exemplary damages. The jury also found that defendants' misappropriation of other trade secrets was neither willful nor malicious. The jury declined to assess damages, finding that the plaintiff had not suffered out-of-pocket expenses or lost profits.

The Court awarded 75% of the plaintiff's costs. The Court found that 75% of the plaintiff's attorneys' time and expense was reasonably related to the successful adjudication of the willful and malicious trade secret misappropriation claims.[19]

In this case, even if the Court agreed that each claim could be separated for purposes of awarding attorneys' fees, Defendants still must provide clear evidence

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[17] 2015 WL 1417329 (Del. Super.).
[18] *Id.* at *1-7.
[19] *Id.* at *8.

that Plaintiff pursued the trade secrets at issue in bad faith.[20] The jury never reached that issue because they found that Defendants were not unjustly enriched by the misappropriation.

The Court finds that there is no authority supporting Defendants' argument that the claims must be split in the manner sought by Defendants. In *Great American Opportunities, Inc. v. Cherrydale Fundraising, LLC*,[21] the Court of Chancery found that "from a practical standpoint, accurately separating work done in pursuit of each claim would be difficult, if not impossible."[22]

As the case progressed, the Court narrowed the scope of the litigation and certain alleged trade secrets were dismissed or voluntarily abandoned. Plaintiff argues that any mention of dismissed trade secrets was either prompted by Defendants in depositions, or was inadvertent. Plaintiff asserts that all alleged secrets were part of a much larger claim and cannot be separated for purposes of calculating time and effort spent on the two discrete claims presented to the jury.[23]

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[20] Defendants also cite *Kim Laube & Company, Inc. v. Wahl Clipper Corporation*, 2014 WL 12461044 (C.D. Cal.) in support of the assertion that attorneys' fees may be awarded for individual claims within an entire lawsuit. However, the analysis remains the same: Defendants must prove that Plaintiff pursued their claims in bad faith.

[21] 2010 WL 338219 (Del. Ch.).

[22] *Id.* at *29.

[23] The Court has reviewed the evidence relating to the issue of whether Incyte pursued abandoned claims. The Court finds that the claims related to the chemical structure were neither improperly nor affirmatively pursued by Plaintiff following the Dr. Ozipov deposition.

CONCLUSION

Defendants have not demonstrated that Plaintiff pursued its claims in bad faith. The case had many moving parts and was extremely hard-fought. The litigation involved a massive amount of evidence, and many issues were decided by the Court throughout the litigation process. The trial lasted ten days and the jury engaged in serious and lengthy deliberations at the conclusion of trial. The outcome was not at all certain or one-sided. If it had been, the Court would have granted a directed verdict.

Defendants have failed to meet the burden justifying an award of attorneys' fees. The Court need not address the unclean hands argument made by either party. **THEREFORE, Defendants' Motion for Attorneys' Fees is hereby DENIED.**

IT IS SO ORDERED.

The Honorable Mary M. Johnston